

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Time Warner – Advance/Newhouse Partnership, d/b/a Time Warner Cable)	CSR 5940-E
)	
Petition for Determination of Effective Competition in Thirty-Three North Carolina Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2005

Released: March 11, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner – Advance/Newhouse Partnership d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition for a determination of effective competition in the thirty-three North Carolina Communities listed in Attachment A¹ (the “Communities”) pursuant to Section 623(a) of the Communications Act of 1934, as amended (“Communications Act”),² and the Commission's implementing rules.³ Time Warner alleges that its cable systems serving those Communities are subject to effective competition pursuant to Section 623(a) of the Communications Act,⁴ and the Commission's implementing rules,⁵ and is therefore exempt from cable rate regulation. More particularly, Time Warner claims that the presence of effective competition in the Communities stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, Direct TV and DISH Network. Time Warner claims it is subject to effective competition in these Communities under the “competing provider” effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.

2. The local franchising authority of each of these Communities (the “LFAs”) filed a joint Opposition to the petition, and Time Warner filed a reply. In addition, Time Warner filed a supplement to its petition in response to a Media Bureau request for a clarification regarding information contained in the initial petition. The LFA's filed a response to the supplement. Using data from the LFA's response, Time Warner filed an additional pleading containing a recalculation of DBS subscribers in some franchise areas, to which the LFAs replied.

¹ Time Warner subsequently withdrew its request with respect to the Town of Chapel Hill (CUID NC 0234).

² 47 U.S.C. § 543(a).

³ 47 C.F.R. § 76.905(b).

⁴ 47 U.S.C. § 543(a).

⁵ 47 C.F.R. § 76.905(b).

II. DISCUSSION

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁶ as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.⁷ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁸ Section 623(1) of the Communications Act provides that a cable operator is subject to effective competition, if any one of four tests for effective competition set forth therein is met.⁹ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.¹⁰

4. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.¹¹ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.¹² Time Warner has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹³ The LFAs contended that this evidence is inadequate to establish that the Community populations have been sufficiently made aware of the availability of DBS services to satisfy the first prong of the competing provider test.¹⁴ We disagree. DBS subscriber growth has reached approximately 23.16 million as of June 30, 2004. Direct TV is the second largest MVPD.¹⁵ We find it reasonable to conclude that for purposes of the first prong of the competing provider test, the population of the Communities at issue here is aware of the availability of DBS services.

5. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁶ We further find that Time Warner has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video

⁶ 47 C.F.R. § 76.906.

⁷ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁸ See 47 C.F.R. §§ 76.906 & 907.

⁹ See 47 U.S.C. § 543(1)(1)(A)-(D).

¹⁰ See 47 C.F.R. §76.905.

¹¹ 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

¹² See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹³ See Petition at 5.

¹⁴ Opposition at 4.

¹⁵ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb. 4, 2005).

¹⁶ See 47 C.F.R. § 76.905(g); see also Petition at 6 and Exhibit B, DISH Network Channel Lineup & Exhibit C, DirecTV Channel Lineup.

programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner's assertion that it is the largest MVPD provider in each of these Communities was not disputed by the LFAs.¹⁷

7. Time Warner provided 2000 Census data showing the number of households for each of the Communities.¹⁸ Next, Time Warner determined the zip code that covered each community in whole or part. For each zip code, Time Warner obtained DBS subscriber data from SkyTRENDS. That figure was reduced by 10 percent to reflect the possibility that some households subscribe to both cable and DBS service and to take into account commercial or test accounts.¹⁹ Time Warner then compared the 2000 Census households for each of the Communities with the households in each of the U.S. Postal Zip Code areas encompassing each Community, and allocated that proportion of the DBS subscribers within each such Zip Code to each Community.²⁰ To verify the accuracy of Time Warner's calculations, we made our own calculation of the DBS subscribers allocated to each community using the data provided by Time Warner.²¹ The resulting numbers of DBS subscribers were then divided by the household numbers for each Community to demonstrate that in all of the communities, the DBS providers collectively have attained subscriber penetration levels that exceed 15 per cent.²² These ranges are consistent with the 28 percent DBS penetration level for the state of North Carolina.²³ Based on this information we find that Time Warner has satisfied the second prong of the competing provider test in all of the Communities.

8. The LFAs dispute Time Warner's penetration figures for each of the Communities on the grounds that they are based on a flawed approach. The LFAs contend Time Warner's use of an allocation ratio methodology does not provide an exact measurement of DBS subscribers.²⁴ The LFA's maintain that Time Warner's methodology includes the buying habits of residents outside of the franchise area, including in some cases, residents fifty miles from the franchise area.²⁵ As we have found in similar cases, we believe that the allocation ration methodology is sound and accurately quantifies subscribers using the best available DBS subscriber data.²⁶ The LFAs fail to provide any support for their contention

¹⁷ Petitions at 7. Time Warner's assertion that it is the largest MVPD is based on its submission indicating its residential subscribership exceeds the aggregate total of DBS subscribers in all of the communities except Chatham County (NC0468). In that franchise area, Time Warner was not able to determine the largest MVPD. Time Warner asserts that a determination of effective competition may be made nonetheless because both it and the DBS providers have a penetration rate in excess of 15 percent. *Id.* at 11.

¹⁸ *Id.* at Exhibit G.

¹⁹ *Id.* at 9.

²⁰ *Id.* at Exhibit F.

²¹ *See* Attachment A.

²² Time Warner asserts DBS subscriber penetration levels range from 15 percent in Durham County to 37 percent in the Town of Wade. *Id.* at 9-10 and Exhibit F. The penetration rate for each Community is set forth on Attachment A.

²³ Petition at 11 and Exhibit I.

²⁴ Opposition at 5.

²⁵ *Id.* at 10.

²⁶ *See e.g.*, Charter Communications Properties, LLC, 17 FCC RCD 4617 (MB 2002), Century-TCI of California, LP, 17 FCC Rcd 18313 (MB 2002).

that subscriber choice of MVPD varies significantly across any of the zip codes to the extent that the allocation ratio methodology skews results considerably.

9. In addition, the LFAs argue that the data Time Warner uses in its calculations is neither accurate nor credible. The LFAs submit that Time Warner uses the wrong zip codes to make its calculations. The LFAs provided the zip codes they believe encompass the franchise areas.²⁷ This submission, however, confirms Time Warner's assertion that effective competition is present. For some of the franchise areas, Time Warner ran its calculations using the zip codes preferred by the LFAs, and again found the DBS penetration exceeded 15 per cent.²⁸ Therefore, we cannot accept the LFAs' data as a credible basis for rejection of the data and DBS subscriber allocations presented by Time Warner.

10. In their response to Time Warner's supplement, the LFAs argue that the satellite subscriber count should be reduced by a factor greater than ten per cent to account for households that subscribe to both cable and satellite, as well as households that have multiple receivers.²⁹ When Time Warner filed its petition, however, the ten percent figure used was the inflation percentage recommended by SkyTrends.³⁰ We believe the DBS penetration estimates provide a sufficient margin of error with respect to the 15 percent competing provider test threshold to overcome any concerns of double counting of DBS subscribers.³¹

11. Finally, the LFAs also criticized Time Warner's failure to support its petition with SkyTrends' Zip plus four data, which they contend is available and would more accurately identify the numbers of DBS subscribers within each Community than the five digit Zip Code data used.³² Time Warner met its initial burden of coming forward with evidence relative to effective competition in the Communities at issue, by presenting DBS subscriber penetration levels developed from subscriber allocation figures based on the five digit Zip Code data discussed above. If the LFAs believed that other data would provide more accurate DBS subscriber counts, the burden to present such evidence for the record was theirs. The LFAs failed to provide such data. We do not find the LFA's unsupported argument alone adequately rebuts the initial evidentiary showing made by Time Warner.

²⁷ Response to Supplement at 11 – 16.

²⁸ Reply to Response to Supplement at 9 – 10.

²⁹ Response to Supplement at 11. The LFAs cite a letter written by SkyTrends in September of 2002, which states that SkyTrend's data would be improved to avoid double counting households with multiple receivers. *Id.* at Exhibit B. To support their claim of a large number of dual cable/DBS subscribers, the LFAs cite a Lehman Brother's Research Report, but do not include the report in the record. Opposition to Reply to Response to Supplement at n.28. Other analysts consider the overlap between cable and DBS subscribers to be small; See Morgan Stanley Equity Research Report "Cable/Satellite" at 8 (Jan. 8, 2004) (indicating 3 percent subscriber overlap between DBS and cable).

³⁰ As noted in the letter cited by the LFAs, SkyTrends has since revised its inflation estimate from ten to fifteen percent. Response to Supplement at Exhibit B.

³¹ If a fifteen percent inflation estimate were used in the calculations, all but 3 communities would exceed fifteen percent DBS penetration.

³² Opposition at 8.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition in the North Carolina Communities set forth on Attachment A, filed by Time Warner – Advance/Newhouse Partnership d/b/a Time Warner Cable **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the Motion to Withdraw the petition with respect to the Town of Chapel Hill, North Carolina **IS GRANTED WITHOUT PREJUDICE**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
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³³ 47 C.F.R. § 0.283.

ATTACHMENT A
CSR 5940-E

COMMUNITIES AT ISSUE

Community	CUIDs in Franchise	2000 Census HH	Zip Codes HH	Allocation	DBS Subs/ Zip Codes*	DBS Subs Allocated	CPR**
Aberdeen	NC0043	1,526	18,345	0.083	2886	240	15.73%
Apex	NC0067	7,397	50,868	0.154	12,092	2105	28.45%
Carrboro	NC0130 NC0649	7,570	62,376	0.121	13,636	1655	21.86%
Chapel Hill	NC0234	withdrawn					
Chatham (Chatham North East)	NC0468 NC0997	16,364	85,781	0.187	26,670	5104	31.19%
Clayton	NC0065	2,768	27,814	0.100	9,372	933	33.70%
Durham	NC0343 NC0650	13,118	131,297	0.100	19,741	1972	15.04%
Fairmont	NC0218	1,078	18,872	0.057	4,748	271	25.16%
Farmville	NC0322	1,839	4,052	0.454	1,021	463	25.20%
Fuquay-Varina	NC0066	3,122	79,510	0.039	17,105	672	21.51%
Garner	NC0069	6,950	28,723	0.242	6,948	1681	24.19%
Goldsboro	NC0096	14,630	46,137	0.317	10,842	3438	23.50%
Hillsborough	NC0068 NC0936	2,101	40,706	0.052	7,545	389	18.54%
Holly Springs	NC0278	3,316	54,514	0.061	14,198	864	26.04%
Knightdale	NC0304	2,172	63,205	0.034	14,896	512	23.57%
Lumberton	NC0013	7,827	20,787	0.377	4,757	1791	22.88%
Morrisville	NC0277	2,476	44,380	0.056	10,514	587	23.69%
Mount Olive	NC0226	1,170	17,051	0.069	5,336	366	31.29%
Orange	NC0256 NC0276	19,041	107,311	0.179	21,072	3685	19.35%
Oxford	NC0133	3,188	10,493	0.304	3,785	1150	36.07%
Pinebluff	NC0245	449	18,345	0.024	2,886	71	15.73%
Pinehurst	NC0045	4,510	31,713	0.142	9,625	1369	30.35%
Pittsboro	NC0470	855	51,033	0.017	10,780	181	21.12%
Raleigh	NC0028	112,608	206,974	0.544	34,388	18709	16.61%
Rolesville	NC0304	353	13,488	0.026	3,902	102	28.93%
Selma	NC0063	2,254	6,411	0.352	2,273	799	35.45%
Smithfield	NC0064	4,417	27,851	0.159	10,038	1592	36.04%
Wade	NC0786	196	2,270	0.086	858	74	37.80%
Wake Forest	NC0314	4,617	58,484	0.079	15,454	1220	26.42%

Community	CUIDs in Franchise	2000 Census HH	Zip Codes HH	Allocation	DBS Subs/ Zip Codes*	DBS Subs Allocated	CPR**
Wake County (Holly Springs) (Knightdale) (Morrisville) (Raleigh) (Rolesville) (Wake Forest) (Wendell) (Zebulon)	NC0259 NC0970 NC0078 NC0451 NC0784 NC0452 NC0512 NC0449 NC0417 NC0416 NC0783	60,905	297,767	0.214	64,761	13741	22.56%
Wendell	NC0341	1,675	35,011	0.048	8,315	398	23.75%
Youngsville	NC0561	251	25,545	0.010	9,280	91	36.33%
Zebulon	NC0303	1,551	14,838	0.105	4,649	486	31.33%

* DBS Subscribers minus 10%

** Competing Provider Rate – DBS penetration in Franchise Area